State of Delaware

Public Service Commission

IN THE MATTER OF INTEGRATED RESOURCE PLANNING FOR THE PROVISION OF STANDARD OFFER SUPPLY SERVICE BY THE DELMARVA POWER & LIGHT COMPANY UNDER 26 DEL. C. SECTION 1007(c) & (d): REVIEW AND APPROVAL OF THE REQUEST FOR PROPOSALS FOR THE CONSTRUCTION OF NEW GENERATION RESOURCES UNDER 26 DEL. C. SECTION 1007(d)	)))))))))	**DOCKET NO. 06-241**
IN THE MATTER OF THE PROVISION OF STANDARD OFFER SUPPLY TO RETAIL CONSUMERS IN THE SERVICE TERRITORY OF DELMARVA POWER & LIGHT COMPANY (Filed on August 1, 2006)	))))))	**DOCKET NO. 04-391**

COMMENTS OF NRG ENERGY, INC. ON PROPOSED REQUEST FOR PROPOSALS

I. INTRODUCTION

NRG Energy, Inc. ("NRG") is pleased to offer its further comments to the Delaware Public Service Commission (the "PSC") on the draft Request for Proposals ("RFP") and draft Key Commercial Terms of Power Purchase Agreement ("Term Sheet") submitted as a compliance filing by Delmarva Power & Light Company ("Delmarva") on August 1, 2006 in the above-captioned dockets as required by the terms of Section 1007(d) of the Delaware Electric Utility Retail Customer Supply Act of 2006 ("EURCSA")[1]. NRG is a competitive wholesale power generation company with ownership interests in a global portfolio of over 50 power plants, located in the United States, Australia and Latin America, with approximately 25,000 MW of aggregate capacity. NRG has experience with the ownership, operation and development

[1] 26 Del. C. §1007(d)

of generating plants using a wide range of energy resources, including coal, natural gas, fuel oil, nuclear, hydroelectric and wind.

The enactment of EURCSA provides electricity consumers in the State of Delaware ("State") the opportunity to share in the benefits of state of the art generation technology. Consistent with our mission of providing reliable wholesale electricity safely and in a manner consistent with our civic and environmental commitment to the communities we serve, NRG hopes to be a constructive participant in this process. Accordingly, NRG appreciates the opportunity to have previously submitted comments to the PSC on August 17, 2006 and to have participated in the August 18 workshop to discuss the RFP and Term Sheet with the PSC. In furtherance of NRG's desire to continue to participate in this critically important initiative, NRG respectfully offers this filing to supplement its August 17, 2006 letter.

NRG respectfully suggests that Delmarva has failed in several areas to produce an RFP which is consistent with the stated goals and spirit of EURCSA. EURCSA explicitly states that in the development of its Integrated Resource Planning ("IRP"), Delmarva is to consider projects which: (1) utilize new or innovative base load technologies (such as coal gasification)[2]; (2) provide both short-term and long-term environmental benefits to State residents[3]; (3) make use of facilities which have existing fuel and transmission infrastructure[4]; (4) utilize existing brownfield or industrial sites[5]; (5) promote fuel diversity[6]; (6) support or improve reliability[7];

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[2] 26 Del. C. §1007(c)2(i).

[3] 26 Del. C. §1007(c)2(ii).

[4] 26 Del. C. §1007(c)2(iii).

[5] 26 Del. C. §1007(c)2(iv).

[6] 26 Del. C. §1007(c)2(v).

[7] 26 Del. C. §1007(c)2(vi).

and (7) bolster price stability.[8] Further, the legislature, in EURSCA, has charged the PSC and the Energy Office with the responsibility to ensure that each RFP "elicits and recognizes" the value of the foregoing criteria.[9]

As the legislative intent of EURCSA is to promote the development of new generation which meets such criteria, the RFP should firmly and consistently show preference to proposals which will advance these policy goals. NRG, in Section II of this filing, highlights certain of the provisions of the RFP that must be changed to enhance the prospects that the RFP encourages a broad range of qualified bidders to propose the development of significant new generation capacity in the State that meets the specified criteria set out in EURCSA and is otherwise successful in bringing much-needed new electric generating capacity to the State. Further, NRG highlights additional provisions of the RFP which must be amended to ensure that these bids are evaluated by Delmarva in a fair and transparent manner and under appropriate and objective evaluation criteria in order to realize the policy goals of the EURSCA.

The legislature recognized in the EURSCA that in order to promote the development of new generation capacity in the State, Delmarva should offer a long-term output contract between Delmarva and developers of new generation in order to provide developers the requisite incentive to invest in new generation capacity in the State. As discussed in Section III of this filing, the Term Sheet covering provisions of the proposed power purchase agreement ("PPA") unfortunately contains several provisions which, if incorporated in the final PPA, will limit the potential pool of bidders and thereby adversely affect the quality and quantity of bids to the detriment of all Delawareans. Specifically, the Term Sheet does not, in several key areas, reflect an appropriate risk allocation between the Seller and Buyer. This will, among other things,

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[8] 26 Del. C. §1007(d)1.

[9] 26 Del. C. §1007(c)2(vii).

decrease the likelihood that bidders will be able to obtain project financing on usual and customary terms for the construction of new generation capacity in the State. Project financing (which is a type of secured lending that is widely used for the financing of large energy and infrastructure projects in the United States and internationally whereby lenders make loans to a single purpose project entity and look only to the cash flows of that entity for repayment of such loans) enables developers to raise large sums of money based upon an evaluation of an asset and its contractual structure and finance construction of such assets at a generally lower capital cost than if such developers used equity funding. This ability to source hundreds of millions of dollars at lower capital costs enables all developers to make more cost-effective bids. However, since the lenders in a project financing look only to the single purpose project entity for repayment of loans, the terms of the key revenue arrangements (here, the PPA) must be sufficiently robust to support all cash flow needs of a project.

Finally, Section IV of this filing sets out certain matters which are unclear in the proposed RFP and which, if clarified, would assist all bidders in providing more responsive submittals to the RFP that will effectively and efficiently meet the needs of Delaware's citizens and the policy objectives of EURCSA. These revisions will allow the RFP to achieve its overriding goal of meeting the long-term energy needs of the State's residents in a cost-effective manner.

II. CHANGES TO PROPOSED RFP

A. Size of the Proposed RFP

The size of the New Generation Resource(s) must be large enough to achieve the goals of EURCSA. Under EURCSA, the RFP must elicit and recognize the value of "proposals that

utilize new or innovative base load technologies."[10] However, the 200 MW size limit proposed in Delmarva's draft RFP appears directed at non-base load technologies (*e.g.*, simple cycle combustion turbines) as base load power plants are typically sized at 500-600 MW, or more. Only plants of such size are capable of capturing the scale economies associated with high-efficiency (low heat rate) technologies, thus allowing electricity consumers in Delaware to capture the advantages of more efficient use of fuels. Coal gasification resources, such as integrated gasification combined cycle ("IGCC"), which are specifically referenced in EURSCA[11], exhibit even more pronounced scale economies than other types of base load generation, as substantial capital investment can be more economically recovered if spread over a larger unit's output. Delmarva's proposed 200 MW size limit will make IGCC technology uneconomical for use in the State.

Another core objective of EURCSA is to promote the development of Projects using "resources that encourage price stability."[12] Solid fuels, such as coal, petroleum coke and biomass, are all resources that encourage price stability of delivered electricity. Coal is our nation's most plentiful domestic fossil-fuel energy resource and its use in power generation can materially mitigate the possibility of power price spikes because: (a) coal prices have historically been less impacted by world economic events and thus have been significantly more stable than other fuel prices (e.g., oil and natural gas); and (b) coal supplies can be obtained under long-term contracts that can further mitigate material price fluctuations. However,

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[10] 26 Del. C. §1007(d)(1)a.

[11] 26 Del. C. §1007(c)(1)2.(i).

[12] 26 Del. C. §1007(c)2(vii)

generating plants capable of economical and environmentally responsible coal utilization must be sized large enough to recover their extra capital costs. Delmarva's proposed 200 MW size limit is less than half of the minimum size needed to achieve the benefits of price stability associated with base load, solid fuel resources utilizing fuel purchased under long-term contracts. As the drafters of EURCSA recognized, the electricity customers of Delaware should not be left exposed to the price volatility of natural gas-fired generation.

IGCC plants offer the additional benefit of extremely low emissions of such pollutants as fine particulates and mercury without the need for costly post-combustion controls, as well as the ability to capture carbon dioxide, for a reasonably known capital cost. Traditional coal combustion technologies, such as pulverized coal ("PC") are not capable of easy retrofit to meet changing environmental standards, including standards that would require reduction of carbon dioxide emissions. NRG understands that future changes in environmental regulations may impose additional capital costs on solid-fuel plants and that recovery of these costs from electricity consumers can defeat some of the price stability advantages of solid fuel generation. However, failure to allow for cost recovery can lead to premature retirement of generating units. The public interest requires that these competing forces be balanced, and this is best achieved by minimizing the likelihood that additional costs needing to be recovered by a power plant owner will be incurred in connection with changes in environmental regulations. In the context of potential regulation of carbon dioxide emissions, the risk of future unforeseen costs may be minimized by including today the known costs of carbon capture into bids submitted under the RFP – thereby deferring only the costs of carbon sequestration (*e.g.*, disposal in deep geologic reservoirs) to be incurred and recovered in the future, should regulations so require. Given the emerging development of sequestration technology, it is likely that the capital and operating

costs of sequestration will become better defined over the next five years (which is the time horizon for the construction of a new solid-fuel plant). Accordingly, the impact of sequestration on price will likewise be more predictable as a new plant reaches its commercial operations date. Carbon capture-ready IGCC technology offers the electricity consumers of Delaware a balance between the aforementioned competing forces, but consumers will only be able to realize the advantages of IGCC under an RFP sized properly to allow IGCC to compete and a PPA that provides for the purchase of sufficient capacity for a developer to obtain project financing to finance the construction of such a facility.

EURCSA requires Delmarva to "evaluate all available supply options during a ten (10)-year planning period in order to acquire *sufficient, efficient and reliable resources over time to meet its customer's needs*…" (emphasis added).[13] To date, Delmarva has not provided any cogent justification regarding the 200 MW size limit in its written RFP filing and, given the foregoing directive, NRG respectfully submits, Delmarva has failed to comply with the requirements of EURCSA.

NRG notes that Delmarva did attempt to explain its reasoning behind the 200 MW size limit at the public workshop held on August 18, 2006 to address Delmarva's RFP proposal. Delmarva's representative noted that EURCSA requires "under the IRP, that 30 percent of the sourcing of supply for standard offer service must come from the wholesale market through bid and auction process. . . So, you carve that out and say. . . what's left to be serviced through other

[13] 26 Del. C. §1007(c)(1).

alternatives?"[14] Delmarva's reasoning appears to be that EURCSA's requirement for at least 30 percent of SOS to be obtained through a wholesale market bid and auction process is reserved for the IRP and is not to be considered in the RFP process.

NRG respectfully submits that Delmarva's reading of EURCSA is incorrect. In NRG's view, the IRP is a comprehensive process that contains within it an RFP process designed to test the markets for the best supply options. Under EURCSA, the IRP and RFP are not separate and parallel tracks for meeting SOS needs. Delmarva's ultimate IRP proposal is limited in that no less than 30 percent of supplies will have to come from wholesale purchases made pursuant to a bid and auction process. This means, for example, that Delmarva could not lawfully propose a self-build option for 100 percent of its SOS requirements at the culmination of the IRP. But Delmarva could lawfully propose to purchase all of its SOS requirement from the winning bidder(s) in its RFP. The 30 percent represents a minimum, not an exclusion. Moreover, the reference in EURCSA to the "wholesale market" should not be read to mean "spot" markets or some concept other than the RFP. The statute does not say "wholesale spot markets" and Delmarva must not be permitted to read words into the statute that are not there.

Later in the Public Workshop, Delmarva's representative advanced another rationale for the proposed 200 MW size limit. Mr. Finfrock observed that: "Our average per hour is 400 [MW] . . . and our 98 percent of all hours, we need at least 200 megawatts. And we wanted the RFP to satisfy a substantial portion of our baseload . . . or our around-the-clock need or what we

[14] Comments of Mark Finfrock, Tr. p. 32.

need every hour, and that was 200."[15] In other words, the 200 MW represents an amount of potential SOS load that is present for at least 98 percent of every hour of the year. Delmarva apparently construes the minimum "98 percent of annual hours load" as its base load which is subject to being satisfied by the RFP.

Although, as noted above, EURCSA does require that Delmarva's RFP must elicit and recognize the value of "proposals that utilize new or innovative base load technologies"; EURCSA does not restrict Delmarva's RFP to only satisfying "base load" requirements or acquisition of base load capacity. EURCSA does not limit the RFP to any specific fraction of Delmarva's load-duration curve.

Moreover, Delmarva's definition of base load requirements to mean "load for 98 percent of annual hours" is without foundation and runs contrary to accepted utility practice. Because every generating unit has to undergo scheduled maintenance – and this maintenance is typically performed during the off-peak periods of the year when light-loading conditions might be expected to arise – a "base load" generating plant can typically operate for every hour that it is available for service without concern over light load conditions arising less than 2 percent of annual hours. For example, if an IGCC Project on Delmarva's system is likely to have an 80 percent availability, it doesn't make any sense to define "base load" as the maximum generation source that can be running in all but 2% of hours without being throttled back or taken off line. Such an IGCC plant could be accommodated easily under a less restrictive definition, 90 percent or 80 percent of annual hours, for example. The PSC should require Delmarva to adopt a more realistic definition of "base load" for purposes of evaluating responses to its RFP.

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[15] Tr. p. 52.

More importantly, Delmarva is taking an inappropriately static view of its needs. Delmarva should be considering what its needs will be over the course of the next 10 to 25 years – the proposed PPA Service Term – rather than focusing on its current load. The PSC should require Delmarva to consider what its SOS requirements will be in the year when a proposed new IGCC Project can be expected to go into service, and throughout the maximum 25-year PPA Service Term. NRG notes that if SOS demand grows at 2.5 percent per year, Delmarva's current average 400 MW residential and small commercial load will grow to approximately 740 MW over the course of 25 years. Coupled with a more sensible understanding of the annual hours of operation that an IGCC plant can reasonably be expected to be available for service, Delmarva should be able to accommodate a full-scale IGCC project. The PSC should direct Delmarva accordingly.

Finally, NRG notes that Delmarva's proposals appear to suffer from technological shortsightedness. Although Delmarva has been tasked by EURCSA with conducting an IRP, Delmarva appears unaware that emerging demand side management tools can shift loads from peak to off-peak periods (on a daily cycle) and should be capable of "flattening the peaks" of its SOS loads, thus providing more of a need for base load generating resources on its system. If, for example, a substantial fraction of the homes in Delmarva's service territory had smart energy management appliances (*e.g.*, water heaters, clothes dryers and dishwashers) that could cycle their demands so as to come on in the night, Delmarva's peak load would be flattened but its light-load periods would be filled in. NRG notes that electric utilities in Southern California and Illinois are equipping their customers with advanced "smart meters" that can in some cases provide nearly real-time price signals to the customer. Such technologies will reduce peaks on the utilities' systems, while allowing more efficient use of base load generating units. Finally,

NRG notes that technologies that are likely to be commercialized over the next five years may accentuate these trends. The adoption of plug-in hybrid automobiles, for example, would boost the use of electricity during off-peak periods. On the utility system of the future, loads are likely to be much more level than they have been in the past. In its IRP, Delmarva should be actively considering all of these emerging demand trends, and properly focusing on the addition of base load generation to its system.

Accordingly, for all of the reasons stated above, Delmarva's proposed limit of 200 MW in its RFP must be changed. Delmarva must be directed to revise upward the amount of capacity being sought in its RFP, consistent with the requirements of EURCSA.

B. Threshold Requirements Test

As the RFP is currently structured, the third component of the Credit criterion of the Threshold Requirements suggests that bidders must demonstrate that they possess an investment grade rating for senior unsecured debt[16] thereby precluding non-investment grade entities from submitting bids. This seems to contradict the underlying intent of EURCSA to promote the submission of credible bids which could clearly be made by single purpose project entities controlled by sponsors with a track record of accessing the bank and capital markets for project financing.[17] As a result, NRG recommends the inclusion of objective criteria in the RFP which demonstrate the ability of the applicable sponsoring entity to obtain such financing in order to provide some hurdle to participation and discourage bids which are simply not credible, while limiting the review of credit criteria only in connection with an evaluation of the proposed

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[16] RFP §2.2.2, sub (3), pg. 6.

[17] 26 Del. C. §1007(d).

project level entity for all bids. There is no evidence that contracting with a project level entity will expose Delawareans to additional risks of default on the PPA or a bankruptcy of the entity. Project financing has been used worldwide for the construction and operation of power projects for several decades with great success. In fact, given that lenders to a project level entity can only look to that entity for the repayment of their debt, there is a unity of interest between the creditors of a project entity and its power purchaser to see that the project is constructed, operated and maintained in accordance with appropriate standards so that the project can serve the applicable power purchase agreement and generate the revenue necessary for the lenders to recover their investment.

C. Detailed Evaluation

For proposed projects that pass the Threshold Requirements Test, Delmarva proposes to undertake a Detailed Evaluation in which price factors will be weighted 60 percent and non-price factors will be weighted 40 percent. In its evaluation of price factors, Delmarva proposes to assign 2/3 of the point score (40 points) to projects on the basis of the lowest expected price and the remaining 1/3 of the point score (20 points) to projects on the basis of the most stable prices.

Delmarva's proposed evaluation of price factors (40 percent of the total score) extends beyond consideration of offered capacity and energy prices to encompass virtually every imaginable category of cost that may arise, directly or indirectly, as a result of purchasing from a proposed project. Delmarva proposes to add to the offered capacity and energy prices the estimated cost of (a) Residual SOS Cost Impact, (b) "T&D Project Impact," (c) Transmission Losses or Savings, (d) an Imputed Debt Offset, and (e) an estimate of Loss under Probability of Default. Delmarva's proposed evaluation of price stability (20 percent of the total score) involves measuring the "uncertainty component of the PPA Energy Price, Residual SOS Cost

and Loss under Probability of Default."[18] Collectively, these weightings and related opaque criteria are skewed to favor projects with lower capital costs but potentially higher and more volatile operating costs. This would necessarily (and ironically) lead to a preference, in the "price factor" component, for technologies such as gas-fired combined-cycle generation which is exactly the type of resource which exhibits the price volatility (in contrast to price stability) the legislature wishes Delmarva to avoid in its IRP and the RFP as evidenced by the emphasis on price stability in EURCSA.

Accordingly, NRG urges the PSC to apply a healthy measure of skepticism to Delmarva's proposed evaluation methodologies. Although it is appropriate to evaluate offered capacity and energy prices together on a common basis, NRG submits that such possible contingent costs as "Loss under Probability of Default" cannot be reliably measured over the lengths of time that Delmarva is proposing. For each bidder, Delmarva is proposing to: (1) estimate the likelihood of default and the timing of such default over the life of the PPA, (2) estimate the cost of replacement power (energy, capacity, ancillary services and other attributes) beginning at the time of default and running through the end of the proposed PPA, (3) estimate the offsetting economic value of its security and any claims that may be realized through legal processes, (4) combine all of the probabilities and loss or gain values mathematically (i.e., by means of a convolution approach), and (5) discount everything back to a present value figure that can be compared among all bidders. In other words, Delmarva is proposing to perform a quantitative "Expected Loss and Recovery" analysis over time periods that may range up to 30 years into the future and may involve a number of disparate generating technologies.[19]

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[18] RFP § 2.3, p. 9.

[19] Thirty years is a reasonable time frame, in that five years may be needed for a project to enter service, followed by a 25-year PPA.

Delmarva proposes to use unidentified computer models for this evaluation which hardly encourages the transparency that is the key to a *competitiv*e RFP process (a bedrock principle underlying EURCSA). A quick analysis of the underlying assumptions and data inputs that would be required to undertake a Loss under Probability of Default analysis bears this out. For example, in order to determine the "mark-to-market" exposure of Delmarva at some undefined point which may be 30 years in the future, Delmarva will need to gather inputs from sources such as forward price curves. Reliable forward price curves for power and fuel do not extend out in time to cover the duration of a 25-year PPA. The PSC need only reflect upon the sad history of efforts to predict the prices of power and fuel over long periods of time to realize the flaw in Delmarva's proposal. Generally, NRG notes that any mathematical model is only as good as its underlying assumptions and data inputs, which, if not disclosed or not capable of independent and objective verification, call into question the validity of the entire RFP process. The PSC should direct Delmarva to consider such factors as the possibility of a developer's default in the qualitative weights assigned under the "Non-Price Factors" and to abandon efforts at quantitative assessment of this factor. In any event, whatever metric is to be used in assessing the possibility of a developer's default, this ought to be applied equally under the RFP to any proposed self-build by a non-regulated affiliate of Delmarva.

Other cost factors that Delmarva proposes to model concern the impact of a proposed generating project on the remainder of Delmarva's current and future generating plants (Residual SOS Cost Impact) and Delmarva's transmission and distribution systems (T&D Project Impact and Transmission Losses or Savings). Although such costs are real, NRG urges the PSC to exercise care in reviewing Delmarva's proposals. All models and input assumptions used by Delmarva to quantify these costs must be fully disclosed, transparent, verifiable and available to all RFP participants on a non-discriminatory basis.

Delmarva's proposal to quantify external "balance of system" costs as the impact of a project on its other generating resources and its transmission and distribution systems raises an additional issue beyond transparency. Such costs, by their very nature, depend upon the interaction of a large number of factors. PJM does maintain long-range planning models, but the reliability of any such model decreases the farther out in time one looks. Because Delmarva is proposing to assign 20 points (out of a total of 100) to reflect stability in projected variable costs – including estimated Residual SOS Cost Impact – longer-term PPAs may be assigned higher degrees of cost variability as a result only of uncertainties in the models, thereby disadvantaging higher capital cost projects as described immediately below.

Generating technologies such as IGCC require long-term PPAs in order to spread the cost of capital recovery over time. The use of mathematical models beyond their range of reliable prediction may serve to bias the selection against long-term PPAs, and the capital-intensive, solid fuel, base load projects that require long-term PPAs. NRG strongly urges the PSC to require Delmarva to limit its consideration of such external balance of system costs to no more than five years into the future regardless of the duration of the proposed PPA. This will ensure that the RFP evaluation process will not be compromised by questionable long-range modeling assumptions and will not be biased against technologies requiring longer-term PPAs.

D. Price Factor Evaluation

1. UCAP Calculation

Delmarva proposes to pay for electric capacity on the basis of "Unforced Capacity" ("UCAP"), as determined by the PJM Interconnection ("PJM"). Although NRG supports the use of objective criteria, PJM's method for calculating UCAP relies upon historical data, which will be absent for the new or innovative base load technologies which are clearly favored under

EURCSA. Moreover, a plant employing new technology, such as IGCC, frequently requires a period of time before operation at high availability factors can be achieved.[20]

Delmarva's payment obligation for new capacity acquired pursuant to the RFP should be made more flexible so that bidders utilizing newer technologies will not be disadvantaged since such a result would be contrary to the stated policy of encouraging the development of such resources. An appropriate approach would be for Delmarva to require that a Project's UCAP would not be permitted to fall below a stipulated percentage of the then-applicable Monthly Contract Capacity during the first 3 years of the Services Term[21]. This will ensure that innovative technology Projects will not be penalized by a lack of a "track record" for calculation of UCAP by PJM, and that the amount of Capacity sold under the PPA will accurately reflect both the spirit and language of EURCSA and the energy needs of Delmarva and the State's SOS customers.

2. Imputed Debt Offset

In ranking proposed projects by their estimated cost, Delmarva proposes to add a cost factor relating to a proposed PPA's "Imputed Debt Offset."[22] Delmarva explains that because "[d]ebt rating agencies view long-term PPAs as debt-like in nature…[bids] will be evaluated and a cost assigned to account for the incremental equity required to return Delmarva's

[20] For example, Tampa Electric Company's Polk Power Station, an IGCC demonstration plant, did not achieve availability factors approaching 90 percent until its third year of operation. *See* testimony of Mr. Charles R. Black, Vice President, Energy Supply, Engineering & Construction, Tampa Electric Company, before the U.S. House Subcommittee on Energy and Air Quality, June 24, 2003; http://energycommerce.house.gov/108/Hearings/06242003hearing968/Black1548.htm.

[21] For example, year one 65%, year two 75% and year three 80%.

[22] RFP § 2.3.6, p. 11.

capital structure to the ratios that would be in place excluding a PPA being imputed as debt by the rating agencies."[23]

Delmarva's proposed Imputed Debt Offset is inappropriate for a number of reasons and should be eliminated from the RFP process. First, Delmarva is simply incorrect in its premise that its debt rating will necessarily suffer from entering into a PPA. In assigning debt ratings, the rating agencies consider the totality of a utility company's financial position. PPAs and other long-term contracts are but one of many factors that are evaluated in assigning ratings. Delmarva has not demonstrated that entering into a PPA will impose an actual cost upon the company, and has certainly not proven that this cost can be represented as an incremental amount of equity required to return its balance sheet to pre-existing levels.

Second, in assigning credit ratings, the agencies are primarily concerned with the ability of the subject company to service its debts. If costs under a PPA are reasonably assured of pass-through in retail rates, the agencies would likely be relatively unconcerned with the PPA. The close involvement of the PSC and the other Delaware governmental agencies with jurisdiction over Delmarva in reviewing the RFP process should provide reasonable assurance to the ratings agencies that Delmarva's ultimate selection will be considered prudent, and thus, recovery in retail rates will be unlikely to be disputed. Under such circumstances, an "Offset Factor" should not be automatically assigned to proposed PPAs.

Third, the PSC should recognize that the RFP process is fundamentally motivated by growing electrical demands in Delaware. Any PPA entered into by Delmarva will be matched by revenues from increased sales of electricity. Delmarva's proposed adjustment factor appears aimed at returning its balance sheet to its pre-RFP condition, but Delmarva is ignoring the positive impact of additional cash flow from a growing demand upon its financial condition.

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[23] *Id.*

NRG notes that a number of other states have held proceedings to consider this "debt equivalency of PPAs" issue. For the most part, state regulatory authorities have responded that a utility company may file a rate case in the event of a downgrade by the ratings agencies, and may request remedies (such as an increase in allowed return on equity), but that automatic and formulaic adjustments for PPAs will not be adopted.[24]

Finally, Delmarva appears to be neglecting the impact on its balance sheet of selecting its "self-build" generation option. If Delmarva undertakes its own construction plan, it is likely to incur additional debt in the process. Also, a self-build option would expose Delmarva to long-term contracts for fuel supplies. Inclusion of the Imputed Debt Offset factor in Delmarva's RFP appears to be a thinly-veiled attempt to establish Delmarva-supplied generation as the preferred choice since the Imputed Debt Offset would otherwise hamper all other bidders. If the PSC ultimately decides to allow the inclusion of such a factor, it must apply a comparable evaluation to Delmarva in the final IRP process.

E. Non-Price Factor Evaluation

In section 2.4 of the RFP, Delmarva addresses its consideration of non-price factors in ranking projects proposed under its RFP. Delmarva proposes to award a total of 40 points for non-price factors, and to consider eight different factors in the process. Specifically, Delmarva proposes the following factors and associated points: (a) Environmental Compatibility (7 points); (b) Operation Date and its Certainty (4 points); (c) Reliability of Technology and Innovation (5 points); (d) Fuel Diversity (7 points); (e) Site Development (5 points); (f) Bidder Experience, Safety and Staffing (5 points); (g) Financial Plan (5 points); and (h) Contract Terms

[24] *See, for example*, Re Southern California Edison Company, 238 PUR4th 206, 213 (2004); In re: Petition by Florida Power & Light Company for Approval of a Standard Offer Contract and Revised COG-2 Tariff, 1999 Fla. PUC LEXIS 1601.

(2 points). NRG respectfully requests the PSC to consider a number of modifications to Delmarva's proposal, as set forth below.

1. Environmental Compatibility

The Environmental Compatibility non-price evaluation factor should be assigned a higher point value. It cannot be overemphasized how vitally important it is for any new generation resource located within the State to offer environmental benefits. This is an expressly stated goal of EURCSA[25] and as a result, it should be afforded more emphasis in the bid selection process. The point value for Environmental Compatibility should be raised to 10.

2. Reliability of Technology and Innovation

Delmarva's description of its objectives in assigning the five points available under this criterion suffers from major internal inconsistencies. On the one hand, Delmarva correctly notes that the EURCSA requires a preference for projects using innovative technology (e.g., coal gasification), while on the other hand, Delmarva proposes to award points for the "technical maturity" of the technology proposed, and also proposes to award points for less complex systems.[26] In this latter respect, Delmarva observes that "gas-fired combined cycle plants would score higher than coal-fired steam plants with respect to this criterion."[27]

Delmarva appears to be concerned with the availability of generating plants selected in its RFP and is proposing to include this non-price factor as a surrogate for the expected availability of a proposed plant utilizing particular technologies. In the description of its proposed allocation of points, Delmarva explains that: "Points will be awarded on the basis of the technology demonstrating the ability to meet availability requirements during commercial operation."

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[25] 26 Del. C. §1007(c)2(ii).

[26] RFP § 2.4.2(C), p. 14.

[27] *Id.*

However, Delmarva's concern with availability is largely addressed in its proposed use of UCAP for adjusting capacity values under the price component of the RFP. A project with low availability will suffer in its capacity payment. There is no need for a separate non-price factor to address expected availability in Delmarva's RFP.

Moreover, many technologies that are extremely "simple" in technological terms may yet have low availabilities. Photovoltaic systems are simple in that they have no moving parts, but nevertheless are limited in their availability by the hours of sunlight and cloud cover. Wind turbines are a simpler technology than thermal generation, but wind turbines have less predictable capacity factors that rarely exceed 40%, while fossil fuel plants consistently exceed 80%. Delmarva's proposed award of points on the basis of technological simplicity appears to be fundamentally arbitrary and is inconsistent with the explicit requirement of EURCSA to encourage innovative technologies.

NRG recommends that Delmarva's arbitrary proposal be replaced with a clear and unambiguous point ranking system to encourage innovative technologies as required by EURCSA. Given coal gasification's explicit mention in EURCSA as a technology worthy of encouragement, NRG recommends that IGCC plants be awarded the full five points available. NRG also recommends that photovoltaics receive the maximum five points. Offshore wind energy and biomass-fired facilities using poultry waste (a significant environmental concern in Delaware) should be awarded four points, as these technologies are innovative for Delaware, but have been demonstrated elsewhere. NRG recommends that somewhat more established technologies, including fuel cells, on-shore wind, industrial cogeneration and other forms of biomass should receive three points. Coal-fired units using supercritical steam cycles with full post-combustion pollution controls should receive two points. Natural gas-fired simple and combined cycle units, and conventional sub-critical coal-fired steam units should receive only one point.

3. Siting Plan

The siting requirements for the RFP should be revised to give preference to proposals which will utilize brownfield or existing power plant sites. EURCSA expressly calls for an evaluation criteria of siting feasibility and the use of existing brownfield and industrial sites.[28] As the Legislature recognized while drafting EURCSA, generation projects built on brownfield sites are more feasible than "greenfield" because they offer substantially less impact on the environment. As a result, the Siting Plan component of the Site Development evaluation criterion should reward bidders who propose to use brownfield or existing plant sites. Preference should be given to siting plans which meet the following criteria:

a. Bidders that demonstrate actual control of their proposed sites. Any purchase option or binding letter of intent held by bidders who do not own or lease their proposed sites at the time their proposals are submitted should be carefully scrutinized for conditions or limitations that may restrict the bidder's efforts to obtain actual control. More points should be awarded to bidders demonstrating actual control and less to those who only have an option or letter of intent.

b. Proposals that demonstrate the developer's ability to satisfy the zoning requirements of the proposed site. More points should be awarded to proposals with zoning plans which demonstrate the least amount of difficulty in meeting local zoning requirements.

[28] 26 Del. C. §1007(d)(1).

c. Proposals that offer greater degrees of siting feasibility. More points should be awarded to proposals in which the proposed project site has existing fuel delivery, fuel transportation (where applicable) and transmission infrastructure.

4. Permitting

The RFP should include an evaluation criterion that recognizes the value of a proposal that is more likely to obtain the necessary permits and governmental approvals at the local, state and federal level (e.g., due to reuse of an existing site and implementation of base load generation with a favorable environmental profile). This will advance the EURCSA goal of selecting projects which offer siting feasibility[29] and thus are capable of being brought online sooner to meet the State's energy needs.

5. Financial Plan

The Financial Plan factor should be revised to reflect the need for new generation projects solicited by the RFP to be "financeable". In today's marketplace, lenders typically do not make commitments to lend until a power purchase agreement is already in place. Instead of requiring bidders to submit evidence of commitments from financial institutions[30], bidders should be able to only submit letters of intent or support from lenders expressing their willingness to finance a Project. As mentioned above in the Introduction and the discussion of Threshold Requirements Test,[31] any successful bidder would most likely fund the development of its facilities through a project financing. Thus, the RFP should contain evaluation criteria which are consistent with the financial landscape for generators. This is the only way to fulfill

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[29] 26 Del. C. §1007(d).

[30] RFP §2.4.2(H), pg. 17.

[31] *See supra* § II.B.1.

the purpose of EURCSA, which is to bring new generation resources into the State to meet the needs of Delmarva's customers. It is unrealistic to expect bidders to have obtained firm commitments from lenders by the time proposals are submitted, given the level of due diligence necessary to obtain firm commitments.

In addition, allowing Delmarva to submit a proposal without having to provide the security required of all other bidders creates a patently unfair advantage for Delmarva. Pursuant to the State's electricity deregulations laws, public utilities, such as Delmarva, were forced to divest their generation assets and so such utilities should only be allowed to submit their own proposals under the RFP through their respective unregulated affiliates. Thus, Delmarva's unregulated affiliate should be subject to the same terms and conditions which apply to all other bidders, which would include the requirement to provide whatever amounts of security that any other bidder must provide. This would prevent the evaluation process from being skewed in Delmarva's favor.

III. CHANGES TO PROPOSED TERM SHEET

A. Regulatory Out

As currently drafted, the "Regulatory Approval" provision of the PPA would eliminate the ability of a project company to obtain financing consistent with traditional project financing structures and terms. To allow Buyer a unilateral right to terminate the PPA at any time during the Service Term "without liability or further obligation"[32] if full recovery of all amounts payable under the PPA is not permitted by the PSC creates a level of risk that will preclude the financing necessary for a project capable of satisfying the requirements of the RFP. The PSC might provide some reassurance to Delmarva that it will not act punitively after accepting the results of Delmarva's RFP. Nevertheless, as currently drafted, the Regulatory Approval

[32] RFP Attachment 1, pg. 16.

provision represents one of several attempts by Delmarva to shift risks concerning future legal or regulatory developments from Delmarva to the Seller. As with the other examples (*e.g.*, the "Resource Adequacy" and "Change in Law" sections, discussed below), the risks that Delmarva proposes to shift are impossible to estimate or quantify. Banks and bondholders that provide non-recourse financing for a power project simply cannot accept such risks; they are lenders and not speculators.

However, it may be acceptable to require Regulatory Approval to be obtained prior to the Effective Date of the PPA, and to allow either party to terminate if approval is not obtained without modification by a date certain.

B. Resource Adequacy

As currently drafted, Delmarva proposes to impose a "Resource Adequacy" requirement, stipulating that the Seller under a PPA will take whatever steps may be necessary throughout the term of the PPA to meet the requirements of a Resource Adequacy requirement that may in the future be imposed upon Delmarva by the PSC. This requirement is similar to Delmarva's proposed "Compliance with Law" provisions, which impose open-ended and uncapped obligations on Seller. Such conditions will, at a minimum, make financing a project difficult, and may foreclose project financing entirely as lenders will be unable to quantify accurately the risk inherent in potential future regulatory action.

The Resource Adequacy provision also specifies, in essence, that Seller will comply with all regulatory requirements imposed upon it. NRG notes that any Seller under a PPA will be engaged in wholesale sales of electricity in interstate commerce, and thus will be a "public utility" within the meaning of Section 201(e) of the Federal Power Act.[33] As such, the Seller will be subject to FERC jurisdiction, and will be obligated under law to comply with the FERC's

[33] 16 U.S.C. 824a(e).

duly-issued orders. NRG has no issue covenanting to such compliance. However, Seller should not be required to indemnify Delmarva against the cost of regulatory requirements imposed upon it by its regulator, the PSC. Each party to a PPA should be responsible for its own regulatory compliance.

NRG is willing to covenant to cooperate in good faith with Delmarva to help Delmarva satisfy regulatory obligations that may be imposed upon Delmarva, provided that such cooperation does not impose a material burden upon Seller and that Delmarva will compensate Seller for any costs of such regulatory compliance. The PSC must ensure that the form of the PPA reflects this symmetrical and equitable bearing of regulatory burdens.

C. Early Termination Rights for Permitting Failures

The Permitting Completion Deadline must be extended. The proposed period of 18 months is very aggressive for obtaining all necessary permits and other governmental approvals required for construction of a Project. This is particularly true for projects utilizing new and innovative technologies, such as IGCC. For example, NRG anticipates that the permitting process for an IGCC project will realistically take 24 months. This period could, of course, end up being shorter, especially with assistance from the State to streamline and expedite the permitting process.

A short Permitting Completion Deadline will bias the selection toward simple, well understood technologies such as gas-fired combined-cycle Units which is not consistent with the policy premises of EURCSA calling for the adoption of emerging technologies, increased fuel diversity, price stability and environmental benefits.[34] As stated in the discussion of the size of the RFP above, IGCC plants, in particular, meet all of these objectives.[35] The Permitting

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[34] 26 Del. C. §1007(d).

[35] *See supra* § II.A.

Completion Deadline should be at least 24 months and there should be an exception for permitting failures which are caused by an event which qualifies as a Force Majeure event under the PPA.[36]

D. Remedies

First, the Termination Payment payable by the Buyer for a Default by Buyer prior to the Initial Delivery Date is woefully insufficient to compensate the Seller in the event of a Default by the Buyer. As currently drafted, the Buyer is allowed to abandon its obligations under the PPA at any time by only paying a nominal amount ($50 per kW) to Seller.[37] The PSC must recognize that this provision will, again, ironically (when considered in light of the policy objectives of EURCSA) tip the playing field toward bidders proposing low capital cost technologies, such as simple-cycle gas turbines. Moreover, the ability of the Buyer to cheaply buy its way out of the PPA will most likely render a project incapable of obtaining project financing. For example, a 630 MW IGCC project would cost over $1 billion, yet under the current formula in the Term Sheet, the resulting Termination Payment under the PPA would only be $31.5 million. In order to secure the necessary financing for projects to be developed under this RFP, this risk of termination must be mitigated by a payment sufficient to cover all outstanding debt in the event of acceleration and provide a return on equity. This provision must be revised to require that, in the event of Buyer's Default, Buyer shall pay Seller its reasonable and verifiable out of pocket expenses directly resulting from such Default as well as a breakage fee in the amount to be determined by a formula set forth in the Term Sheet.

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[36] RFP, Attachment 1, pg. 11.

[37] *Id.*, pg. 10-11.

Second, there can be no set-off rights in respect of obligations among Affiliates[38]. Delmarva should not be able to reduce payments it must make to a Seller because of monies owed by an Affiliate of the Seller under another contract. The concept of a project financing allows lenders to look solely at the single purpose entity (in this case, Seller) and not concern themselves with the business activities of affiliates of their borrower. Permitting set-off involving affiliated companies would require lenders to assume the risks of the business relationships between Buyer and its affiliates and Seller and its affiliates to determine what cash Termination Payments may be forthcoming to their borrower which is inconsistent with the concept of a project financing. This provision should be revised so that in the event of a termination, the non-Defaulting Party should only be allowed to exercise setoff against amounts owing to the Defaulting Party itself solely under the PPA by amounts payable by the Defaulting Party to the non-Defaulting party itself solely under the PPA.

Third, the provision that permits Buyer to terminate the PPA for a failure to deliver Product more than five times in any calendar year should be eliminated. This provision discriminates against the development of new and innovative base load technologies which are favored under EURCSA and naturally have a longer start-up period than older technologies with associated technical and environmental issues.

E. Compliance with Law

In order to ensure that financing can be obtained for projects to be developed through the RFP, the provision entitled, "Compliance with Law, Environmental Risk and Indemnity," should be revised to more equitably balance the potential liabilities arising out of significant changes in law. The requirement that Seller be responsible for "all risks of environmental matters relating

[38] *Id.*, pg. 11

to the Unit(s) or the Project Site," must be replaced with a market standard alternative.[39] NRG suggests that instead of this open-ended and unilateral requirement, the Seller agrees to negotiate in good faith with Buyer to equitably allocate between themselves costs associated with new environmental risks which arise during the Contract Term. This revision is vital to ensuring that the economic terms that the Seller agrees to at the time of signing the PPA are preserved despite new legal developments. For example, while all applicable Projects should be required to include the cost of carbon capture equipment in the initial bid phase, the PPA should not obligate the Seller to assume the full cost of carbon sequestration (a technology which is currently in the development phase).

F. Security Requirements

The Security Requirement proposed in the RFP for operational projects should be revised so as to not be overly burdensome on bidders. As currently drafted, once the Seller is ready to deliver energy under the PPA, it must post and maintain security to cover the full capacity value and energy costs of the PPA for a two-year period.[40] This amount is extraordinarily excessive in general, and for base load generation projects utilizing new technology in particular. For example, under the formula currently set forth in the PPA, the required amount of security during operations for a 630 MW IGCC plant would equal nearly $500 million. The cost of maintaining such an above-market level of security would add material cost to any project and likely discourage participation in the RFP, to the detriment of the State in seeking a selection of project proposals to meet the citizens' power needs consistent with EURCSA. As a result, this formula should be modified so that energy cost will be the sum of the (negative) differential between the

[39] *Id.*, pg. 13.

[40] RFP §3.4.1.4, pg. 20-21.

contracted price under the PPA and the market price of any replacement power purchased as a result of a failure of the Seller to deliver capacity.

G. Critical Milestones

The critical milestones contained in the PPA should be limited so as to not make the PPA overly burdensome on bidders. The only critical milestone should be the closing of a debt (or equity) financing by an agreed upon date and the occurrence of the Commercial Operation Date by a date certain. The imposition of arbitrary milestones is inappropriate and can place a generator at a great disadvantage, particularly in light of the fact that failure to meet milestones may result in the forfeiture of portions of the security posting.

H. Force Majeure

The Force Majeure provision in the PPA should be revised to allocate certain risks equitably between Seller and Buyer, consistent with customary project development practices and financing structures. First, Buyer should not be excused from making payments due to the occurrence of a Force Majeure event. Payment defaults are never excusable for reasons of Force Majeure under accepted practices. Second, the definition of Force Majeure should explicitly exclude the emergence of general economic conditions which might hinder either party's ability to perform, including changes in prevailing market prices for electric power and the Buyer's regulatory treatment, *e.g.*, with respect to such matters as its allowed return on equity.

I. Delivery Point

The Delivery Point should be changed to properly allocate risks between Seller and Buyer. The Delivery Point for all Energy delivered under the PPA should be the Project's bus bar so that risks of congestion and marginal losses are not borne by the Seller. The PSC should be mindful that stand-alone power plant projects are not affiliated with transmission owners or operators, and have no ability to anticipate or control risks associated with the transmission system.

J. Operational Constraints

The Product under the PPA should be an Unforced Capacity product (*i.e.*, failure to deliver causes reduction in capacity payments independent of real time energy prices). NRG recommends that Sellers have the right, but not obligation, to provide replacement power to pre-approved alternative Delivery Points. As the current "Operational Constraints" provision is drafted, it may be read to imply an obligation on the part of a Seller to obtain replacement power in the market when its plant suffers from a forced outage. Because Sellers are being paid only for the UCAP that their projects are credited with supplying, there should be no obligation to require delivery of "system firm" power.

K. Dispute Resolution

The PSC should not be stipulated as the ultimate decision maker for disputes between the parties.[41] This provision creates the appearance of an advantage for the Buyer and will make it difficult to obtain financing for the Project on standard market terms. Prospective lenders will feel that such disputes would most likely not be decided in favor of the Seller and such uncertainty would make financing a project subject to this RFP very unattractive. Thus, this provision should be revised to refer disputes that cannot be resolved between the parties to an independent arbitration panel or to litigation.

L. Other Terms and Conditions - Assignment

The assignment provision should be revised to eliminate any implication that a Buyer consent is required for any future change of control of the Seller. As currently drafted, a direct or indirect transfer of control of the Units is subject to Buyer consent.[42] This provision would likely impede corporate level transactions which would have no impact on the project or project

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[41] RFP, Attachment 1, pg. 14.

[42] *Id.*, pg. 15.

company which would remain bound by the terms of the PPA (including those provisions regarding performance and security). Therefore, the inclusion of such a provision in the Term Sheet may chill the bidding process as prospective bidders (particularly large, publicly-traded companies) may not participate in the RFP process if they are required to give Delmarva an effective veto right over significant corporate transactions.

M. Other Terms and Conditions – Payment of Costs and Expenses

The provision relating to Seller's payment of Buyer's costs and expenses must be revised to reflect market practice in order to support a potential financing. Specifically, clause (iii) of the last paragraph of "Other Terms and Conditions" should be deleted because it is uncommon in the marketplace for generators to pay for utilities' consultation with counsel when there has been no payment failure, default or Event of Default.

N. Contract Term

The Contract Term should be made more flexible in the event of Force Majeure. NRG proposes that in the event of a Force Majeure which results in a delay of the achievement of Commercial Operation, the parties to the PPA agree to extend the Contract Term day-to-day, capped at the outside to a reasonable amount of time in the aggregate. This will enhance the likelihood that bidders will be able to obtain financing for the project as project finance debt is generally structured to amortize over the life of the PPA. Hence, where the overall revenue period is shorter than originally anticipated due to the occurrence of a force majeure event, particularly during the construction period, lenders often seek an extension of the term to provide sufficient revenues to support the full amortization of the debt.

In addition to the foregoing comments, NRG suggests that bidders be granted access to the full PPA proposed to be used by Delmarva as part of the RFP process, as soon as possible. Under the current draft of the RFP, bidders will only have one month to review the PPA prior to the final deadline for submission of proposals. Bidders should be given more time to review the

PPA so that their proposals will be more responsive to the RFP. Furthermore, earlier access to the PPA will encourage the early submission of proposals and as a result improve the evaluation process.

IV. REQUESTS FOR CLARIFICATION

A. Network Resource

The following statement must be clarified: "Delmarva shall not be responsible for designating proposed projects as a network resource."[43] Does this mean that bidders must submit their own interconnection service request with PJM and seek to obtain point-to-point transmission service from PJM for delivery of Product to Delmarva? The PSC should be mindful of the need to maintain comparable treatment for Seller under the RFP and Delmarva's traditional suppliers. Even the appearance of discriminatory treatment will discourage prospective bidders in the RFP. Network Integration Transmission Service is the service that load-serving entities customarily elect to integrate their various sources of generation supply. The rationale behind the "Network Resource" provision is unstated. NRG questions whether this provision would result in Delmarva's IRP or self-build option gaining an advantage.

B. Accounting

Clarification is needed as to what information bidders must submit pursuant to Delmarva's assessment of proposals for accounting and/or tax treatment. The current description of the information that will be required is too vague. Moreover, NRG questions the relevance in the RFP process of an inquiry into a bidder's tax treatment regarding its investment. The PSC should require Delmarva to eliminate this inquiry into RFP bidder's tax status.

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[43] RFP §1.5, pg. 3.

C. Price Evaluation

As discussed in Section II.C, above, Delmarva proposes to undertake a complex and not well defined modeling exercise in order to evaluate the economics of proposed projects. Even if the PSC accepts NRG's recommendations and requires Delmarva to simplify the evaluation, certain aspects of the Price Evaluation process warrant clarification.

What types of models will Delmarva use to conduct the Price Evaluation, what exactly will be modeled and what data and input assumptions will be used? Are the models that will be used to simulate Delmarva's system consistent with PJM's models? How will such models simulate the Delmarva system or total Delmarva SOS costs? All of these items demonstrate that there is a need for greater transparency in the Price Evaluation process. NRG notes that other jurisdictions, after receiving public comments in similar proceedings, have changed their procurement process to disclose specifically all important pricing and valuation models to be used in the evaluation process. Further, using models and assumptions such as those employed by PJM (despite the general lack of accuracy in all long-term forecast models), which are accessible to the public, will ensure that any new generation project developed through this RFP is an optimized resource within the ISO. Moreover, if transparent and objective testing standards are used (including full disclosure of all Delmarva's and other relevant assumptions, inputs, outputs and models), bidders will be able to better able to tailor their proposals to achieve the goals of EURCSA. Accordingly, this will also enable the State to acquire new generation projects that will meet the needs of the State's residents.

D. T&D Project Impact

NRG is recommending in Section II.C, above, that Delmarva's quantitative estimation of "T&D Project Impact" be limited to five years duration. But even if our recommendation is adopted, the models used to estimate such impacts must be consistent with PJM's models and assumptions and be made available to bidders. In the interests of transparency, the PSC should

require this provision to specifically state that the T&D Impact assessment will be based on PJM data and studies. Finally, it should be clarified that when assessing T&D Impact, in any event, a project that will sell part of its capacity and output into the wholesale market, in addition to offering part of its capacity and output through the RFP, should only have that portion of its T&D Impact associated with the RFP portion considered in the evaluation of its bid.

E. Definition of Product

The definition of "Product" needs to be revised to clarify that the Seller is not responsible for serving any load or Delmarva load obligations. Delmarva is the load-serving entity with the responsibility for meeting the needs of its SOS customers; the Seller will be only a wholesale Seller.

F. Definition of Ancillary Services

NRG would like clarification on the definition of "Ancillary Services." What is covered by the following language: "replacement reserves associated with the Unit(s)"[44]? Although certain types of operating reserves do fall within the PJM tariff concept of Ancillary Services, the provision may be construed to go beyond this concept to include long-term capacity. In particular, the definition should be revised to exclude services which are typically provided by load-serving entities. Requiring successful bidders to provide such services would create an unnecessary burden on generators and likely worsen the financeability of a Project. In addition, it must be clarified that Ancillary Services does not cover services which Seller can not provide at the time of the execution of the PPA, but may be able to provide in the future. Again, this would create an excessive burden on Seller and negatively impact the ability of bidders to obtain project financing for their respective projects.

G. Definition of Environmental Attributes

[44] RFP, Attachment 1, pg. 3.

The definition of Environmental Attributes warrants clarification. Does this definition include allowances for SO_2, NO_x, Hg, CO_2 or other allowances that a Project may be allocated for operations from time to time? In addition, this definition should specifically exclude Environmental Attributes which currently do not exist as of the date of the execution of the PPA, but may come into existence in the future. NRG notes that Delmarva is proposing to require Sellers to bear the risk of future changes in law or regulations, including new environmental requirements, but wants to capture the upside of any future Environmental Attributes without any economic compensation. The PSC should be mindful that a PPA is an economic bargain struck between two parties; the substance of the bargain should be preserved to the greatest extent possible as circumstances change in the future. If new Environmental Attributes are created at some future time, Delmarva may be entitled to offer to buy these from Seller at a fair price, but should not get a benefit that it never bargained for.

H. Lien on Project

NRG would like clarification on the provision granting Buyer a lien on the Project. NRG believes that it should be expressly stated that any Project will be project financed and that Buyer's security interest in the Project will be subordinate to that of any project lenders. Such arrangements are not only customary in project finance, but are necessary in order for lenders to make loans to a single purpose company with no other assets.

I. Confidentiality

Clarification is needed as to whether the confidentiality provision applies to all parties, symmetrically. Currently, the first sentence of this provision only refers to the Seller.[45] This sentence should be revised to apply to all parties to ensure that all parties' information is appropriately protected from disclosure.

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[45] *Id.*, pg. 14.

J. Other Terms and Conditions - Assignment

The assignment provision should be revised to require the Buyer to make certain reasonable accommodations to facilitate the financing of the Project. Currently, the Buyer is not required to consent to any additional terms and conditions typical of a collateral assignment, such as the extension of cure periods or granting additional remedies to lenders. Such accommodations are critical to obtaining project financing and are common in the marketplace. This provision should be revised to specifically require the Buyer to consent to the inclusion of terms and conditions such as step-in rights and the extension of cure periods in a collateral assignment of the PPA.

V. CONCLUSION

The RFP must be amended as described above to seek new installed capacity in the State which is consistent with the stated policy objectives of EURCSA through a fair and transparent process that provides all bidders with the opportunity to compete on a level playing field. Further, NRG requests that certain amendments be made to the Term Sheet as described above so that the resulting PPA will be in a form sufficient to support non-recourse project financing which will provide for a lower all-in capital cost for new generation with the resulting cost savings being available to all Delawareans. All of these suggested revisions are necessary to address the impetus behind EURCSA, which is the need to meet the long-term energy demands of Delawareans in a cost-effective manner.[46]

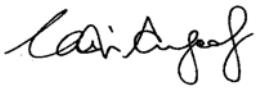
In summary, the RFP needs to better incorporate the evaluation criteria stated in EURCSA. The evaluation process under the RFP should not be biased against new technologies. Also, as currently drafted, the RFP does not allow for base load projects to participate and this must be corrected as EURCSA specifically requires that the RFP "recognize the value of …

[46] 26 Del. C. §1007(d)(3).

proposals that utilize new or innovative base load technologies."[47] Preference must be given to new generation resources which will confer short-term and long-term benefits to the people of Delaware. The RFP currently does not sufficiently value the potential environmental benefits of proposed projects. The RFP should place greater weight on proposals in which will offer greater degrees of siting feasibility by utilizing existing fuel and transmission infrastructure. The use of existing brownfield or industrial sites should be made a more prominent factor in the process of selecting bids. The RFP should consistently give preference to technologies which offer fuel diversity to the State throughout the selection process. When considering the reliability of the technology to be used in a proposed project, the evaluation criteria must be properly balanced so that newer technologies which fulfill other EURCSA objectives are not unfairly disadvantaged. Finally, the bid evaluation process under this RFP must be improved so that ultimately project(s) will be developed through the RFP which will fulfill the primary goal of the State in stabilizing energy prices for today's and future Delawareans.

The procurement process in these dockets will implement the carefully considered legislative objectives that resulted in the passing of EURCSA and further promote the future stability of electric power prices in the State. NRG looks forward to continuing to participate in this matter.

Respectfully submitted,
NRG ENERGY, INC.



By: Caroline Angoorly
Vice President & General Counsel, NE

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[47] 26 Del. C. §1007(d)(1).